2-19-1976

Commonwealth of Kentucky v. Robert B. Hillebrand, and Douglas Lee Powers

Petition for Rehearing 1975-SC-0630

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PETITION FOR REHEARING

SUPREME COURT OF KENTUCKY

File No. 75-~~360~~ 630

COMMONWEALTH OF KENTUCKY — APPELLANT

VS.

ROBERT B. HILLEBRAND and
DOUGLAS LEE POWERS — APPELLEES

Appeal From the Jefferson Circuit Court
Criminal Branch, Third Division

APPELLEES' PETITION FOR REHEARING

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ATTORNEYS FOR APPELLEES

This is to certify that a copy of this Petition has been served upon Honorable J. T. Hatcher, Trial Judge, and the Attorneys for Appellant, Honorable Robert F. Stephens, Attorney General, and Honorable David Armstrong, Commonwealth Attorney, pursuant to R.C.A. 1.250, this 19 day of February, 1976.

Frank E. Haddad Jr.
ATTORNEY FOR APPELLEES

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May it Please the Court:

The Appellees respectfully submit this Petition for Rehearing and urge the Court to grant the Petition and reconsider the case. The Court has correctly stated the case law in this area of the law, but has misapplied it to the circumstances of the present case. The issues argued herein directly affect trial courts and defendants throughout this Commonwealth.

I

THE SUPREME COURT OF KENTUCKY MISAPPLIED THE PRINCIPLE OF COLLATERAL ESTOPPEL UNDER THE DOUBLE JEOPARDY CLAUSE, AS SET FORTH IN ASHE V. SWENSON, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) IN HOLDING ERRONEOUS

THE TRIAL COURT'S RULING ON THE ADMISSIBILITY OF EVIDENCE OF OTHER CRIMES IN THIS CASE.

The Supreme Court of Kentucky, in Commonwealth v. Hillebrand, Ky., ___ S.W.2d ___ (1976) (Appendix A, pp. A-1 to A-5, hereinafter "Commonwealth v. Hillebrand II") ruled that the only evidence the trial court should have excluded in the trial of Hillebrand II was evidence as to "whether Hillebrand ever physically took possession of the money paid by Dunn to Powers." Commonwealth v. Hillebrand II, Appendix, p. A-3. In so ruling, the Supreme Court of Kentucky based its decision on its previous holding in Commonwealth v. Hillebrand, 508 S.W.2d 566 (1974) (hereinafter "Commonwealth v. Hillebrand I") rather than on "the record of the prior [trial court] proceeding, taking into account the pleadings, evidence, charge, and other relevant matter" as required by Ashe v. Swenson, 397 U.S. 436, 444, 90 S.Ct. 1189, 25 L.Ed.2d 469, 475-476 (1970). In this regard the Supreme Court of Kentucky misapplied the applicable law of the case.

In Ashe v. Swenson, supra, the United States Supreme Court in reviewing the principle of collateral estoppel stated that

> "Collateral estoppel" ... means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Id., 397 U.S. at 443, 25 L.Ed.2d at 475.

In Commonwealth v. Hillebrand II, supra, the Supreme Court of Kentucky, in reviewing Ashe v. Swenson, concluded that

> As we understand the holding in Ashe v. Swenson, it is that if an issue of fact has been determined against the prosecution in the trial of an offense, the prosecution cannot again litigate that issue of fact upon a later trial of the same defendant for another offense. Commonwealth v. Hillebrand II, Appendix, p. A-2.

The Court in Ashe v. Swenson supplied the test for determining what fact or facts had been previously decided:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Ashe v. Swenson, supra, 397 U.S. at 444, 25 L.Ed.2d at 475-476.

This Court in Commonwealth v. Hillebrand II adopted precisely the same test. Commonwealth v. Hillebrand II, Appendix pp. A-2 to A-3. The opinions of both the United States Supreme Court and the Supreme Court of Kentucky make it clear that once a fact has been decided before a trial court, further proof to support that fact cannot be subsequently presented at another trial of the same defendant. At the trial of Hillebrand I, the single rationally conceivable issue in dispute before the trial court as is apparent from the record was whether a bribe had passed between Dunn and Powers and Hillebrand. The trial court, by directing a verdict of acquittal, found that there was no bribe. Therefore, evidence supporting this bribe should have been excluded from the Hillebrand II trial.

This Court, in Commonwealth v. Hillebrand II, in reviewing the ruling of the trial court in Hillebrand II on the admissibility of evidence of other crimes, held that

> [T]he only issue of fact that must have been decided against the Commonwealth on the previous trial was whether Hillebrand ever physically took possession of the money paid by Dunn to Powers. It is clear from the record that the decision of the trial court to direct a verdict of acquittal was based solely ... on the fact that the evidence did not establish that the money ever came into Hillebrand's personal possession. Commonwealth v. Hillebrand II, Appendix, p. A-3.

An examination of the record in the trial of Hillebrand I makes it clear that the actual fact to be precluded from further litigation in the trial of Hillebrand II was whether an actual bribery transaction had occurred.

At the trial of Hillebrand I, the matters at issue were the elements of the offense of taking a bribe under K.R.S. 432.350(2): 1) whether the defendant Hillebrand was a government official; 2) whether he took or agreed to take a sum of money as abribe; 3) whether he agreed to do or to omit to do any act in his official capacity. Cf. Brief for Appellant, Commonwealth of Kentucky, Commonwealth v. Hillebrand I, File No. 73-822, p. 12. There is no question that Hillebrand, as the Acting Director of the City of Louisville Department of Building and Housing Inspection, was a government official. There is no dispute that Hillebrand had agreed to destroy certain records, records which would have been useless later in any case. Appendix, p. B-9. There was, however, dispute between counsel for the Commonwealth and counsel for the defendants as to whether the $15,000.00 passed by Dunn to Powers constituted a bribe. It was concluded by the prosecution that

> [T]he evidence clearly shows that there is a bribe and that Mr. Hillebrand acquiesced in the bribe; that he was doing everything in his power to see that the bribe was carried out. Appendix, p. B-10.

The defense concluded that "they haven't shown where it was a bribe." Appendix, p. B-11.

On the other hand, there was no dispute that Hillebrand never physically took possession of the money paid by Dunn to Powers. Both the Commonwealth and the defense agreed on this point. The defense argued that

> There is no question that he [Hillebrand] didn't take that money. And the one [Powers] that did take it, the evidence is that he was taking it to repair the property. Appendix, p. B-8.

The prosecution agreed: "Whether the money was actually handed to Mr. Hillebrand or ... Mr. Powers, I think is immaterial." Appendix, p. B-9. The trial court readily agreed:

> Nobody got any money [but Powers] ... when you say get it, I'm talking about getting set with it [i.e., enjoying the benefit of the money.] Appendix, pp. B-10 to B-11.

This Court in Commonwealth v. Hillebrand I placed great emphasis on the fact that it was not necessary for Hillebrand to take physical possession of the $15,000.00 in order to be found in violation of K.R.S. 432.350(2). Id., 508 S.W.2d at 567. But such appellate holding does not alter the trial court holding in Hillebrand I or the basis of the trial court holding in Hillebrand I that there was no bribe.

Since it had once been determined, by the verdict in Hillebrand I, that there was no bribe, certain testimony of H. M. Dunn, Jr. going to prove the existence of a bribe was correctly excluded in Hillebrand II on the grounds of collateral estoppel.

Furthermore, an alleged trial court error in the granting of a directed verdict of acquittal is not controlling. Indeed, it is the determination of the previous trial court, correct or erroneous which raises jeopardy.

This Court in Commonwealth v. Mullins, Ky., 405 S.W.2d 28 (1966) reviewed the doctrine of double jeopardy, in light of alleged trial court error. The Court found that

> In Commonwealth v. Little, 140 Ky. 550, 131 S.W. 387 (1910), this Court concluded that the trial court erroneously directed an acquittal by virtue of which the accused was discharged. Nevertheless, the verdict operated to free him from the accusation and to prevent a subsequent prosecution for the offense. Mullins, supra, p. 30.

The Court in Mullins went further, in quoting from Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199, 61 A.L.R.2d 1119 (1957), to state,

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Mullins, supra, p. 30.

That the defendant, once subjected to jeopardy, cannot be twice put in jeopardy merely makes it clear that the defendant is not responsible for error on the part of the prosecution, the court, or the jury. As was stated in United States v. Kramer, 289 F.2d 909 (2d Cir. 1961),

> The Government is free, within the limits set by the Fifth Amendment ... to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it on the first trial, no matter how unreasonable the Government may consider that determination to be. [Citation omitted] Kramer, supra, p. 916.

Under the principle of collateral estoppel as set forth in Ashe v. Swenson, supra, the trial court's determination in Hillebrand I that there was no bribe, no matter how apparently unreasonable, was controlling in the trial of Hillebrand II.

The Supreme Court of Kentucky misapplied the principle of collateral estoppel in ruling that the trial court in Hillebrand II should have excluded only the evidence of whether Hillebrand ever physically took possession of the money paid by Dunn to Powers. In fact, the ruling of the trial court in Hillebrand II that the trial court's decision in Hillebrand I was based on a finding that no bribery transaction transpired, was correct in law and was supported by the record.

II

THE SUPREME COURT OF KENTUCKY WAS IN ERROR WHEN IT FAILED TO RECOGNIZE THE DISCRETION VESTED IN THE TRIAL COURT TO RULE ON THE ADMISSIBILITY OF EVIDENCE, IN ACCORDANCE WITH THE STANDARD SET FORTH IN ASHE V. SWENSON, 397 U.S. 436, 90 S.CT. 1189, 25 L.Ed.2d 469 (1970).

The standard set forth in Ashe v. Swenson, supra, for the application of the principle of collateral estoppel to a subsequent proceeding mandated that

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Id., 397 U.S. at 444, 25 L.Ed.2d at 475-476.

Clearly, the determination of which issue is foreclosed from further consideration (based on the review of the previous trial court proceedings), as with the determination of any relevant matter, lies within the sound discretion of the trial court. The trial court ruling should not be disturbed except for an abuse of discretion. As was stated in Wharton's Criminal Evidence (12th ed. 1955),

> Because of the absence of any concrete standard for the determination of relevancy, and because of the wide and endless variety of factual situations which may arise, the trial judge is clothed with broad discretion in determining what evidence is relevant. Id., I Wharton's Criminal Evidence, §148, p. 289.

Besides the authority granted to the trial court to apply general principles of relevancy, the Court in Ashe v. Swenson specifically vested broad authority to the trial court in applying the test for collateral estoppel. The court in Ashe v. Swenson made it clear that the rule of collateral estoppel was not to be applied "with the hypertechnical and archaic approach of a 19th Century pleading book, but with realism and rationality." Id., 397 U.S. at 444, 25 L.Ed.2d at 475.

While the trial court in Hillebrand II did not rigidly conform to a precise standard for the application of collateral estoppel, its decision was reasonable under the circumstances and, in effect, the outcome of its ruling conformed to the Ashe v. Swenson standard.

It should be noted that the trial court in Hillebrand II ruled on the admissibility of testimony by the witness Dunn, Jr. as to his transactions with Powers and Hillebrand with neither the Commonwealth nor defense citing Ashe v. Swenson to the court. The trial court rendered an immediate decision in order to proceed with the trial of Hillebrand II, already in progress. In reliance on the arguments raised by counsel and its knowledge of the principle of collateral estoppel, the trial court ruled admissible:

1) general statements by Dunn about his dealings with Powers,

> THE COURT: It is obvious that some statements made if there were such statements could be admissible in either case or both cases. I think if they are statements made in a general way that they do not identify them with this case for which he had been acquitted, that might be competent in this case. (Appendix, p. C-15).

2) testimony by Dunn that Powers held himself out as an employee of the Department of Building and Housing Inspection of the City of Louisville,

> MR. SCHROERING: And there would be evidence, of course, Judge, of the fact that Mr. Powers represented himself as being an employee of the Housing Department.
>
> THE COURT: I think that's competent. (Appendix, p. C-16)

3) testimony by Dunn that Powers indicated he had great influence in the Democratic Party and could "get things done."

> MR. SCHROERING: However, I believe the Court inferred that acts of the defendants which antidated that, for example, things that occurred in June and July and August, concerning conversations with Powers and this witness,

> those statements, the promises and other statements that were made of the proof of the receipt of the money, because the crime of course that they were charged with to which jeopardy attaches is not an offer to accept but actually the receipt of the money in question that I take it from the Court that those conversations plus of course the conversations relative to Powers "being able to get things done" because of his job that those areas of investigation would be admissible if they occurred prior to the 23rd of September of 1971, is that correct?
>
> THE COURT: Yes, I would say so. I think general statements to that effect without specific reference to the other case, his connection with the Democratic Party and his ability to get things done. (Appendix, p. C-14).

Thus, the Supreme Court overlooked these material facts in the record when it concluded that

> The circuit court would not permit ... evidence of Hillebrand's and Powers' dealings with Dunn ... to be introduced ... . (Commonwealth v. Hillebrand II, Appendix, p. A-2)

Assuming as one must that the trial court in Hillebrand I based its verdict on the fact that there was no bribe, the trial court's ruling in Hillebrand II was clearly proper. While disallowing evidence that would directly prove the passing of a bribe, the trial court did permit the introduction of proof of relevant aspects of the relationship between Dunn and Powers.

The rulings by the trial court in Hillebrand II based on the principle of collateral estoppel were well-reasoned, supported by the facts, and within its discretion.

Thus, the Supreme Court of Kentucky erred when it failed to recognize the discretion vested in the trial court to rule on the admissibility of evidence, in accordance with the standard set forth in Ashe v. Swenson, supra.

CONCLUSION

For the reasons set forth above, the Court was in error in the decision herein, and justice requires that the Court grant this Petition and reconsider the case.

Respectfully submitted,

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APPENDIX

A. Opinion by Supreme Court of Kentucky, Commonwealth v. Hillebrand, ___ S.W.2d ___ (January 23, 1976)

B. In-Chambers Hearing, Motion for Directed Verdict of Acquittal, Commonwealth v. Hillebrand [Hillebrand I] Jefferson Circuit Court, Criminal Branch, Third Division (May 11, 1973)

C. In-Chambers Hearing, Testimony of H. M. Dunn, Jr. Commonwealth v. Hillebrand [Hillebrand II], Jefferson Circuit Court, Criminal Branch, Third Division (April 14, 1975)

RENDERED:
January 23, 1975

SUPREME COURT OF KENTUCKY
No. 75-630

COMMONWEALTH OF KENTUCKY — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, THIRD DIVISION
HONORABLE J. T. HATCHER, SPECIAL JUDGE
No. 145742

ROBERT B. HILLEBRAND and
DOUGLAS LEE POWERS — APPELLEES

OPINION PER CURIAM

CERTIFYING THE LAW

Robert B. Hillebrand, Acting Director of the Department of Building and Housing Inspection of the City of Louisville, and Douglas Lee Powers, a friend of Hillebrand's, were tried jointly under indictments charging Hillebrand with accepting a bribe from one Ed Sutherland, and charging Powers with being an accessory before the fact to that offense. The jury found the defendants not guilty and a judgment of acquittal was entered. The Commonwealth has appealed, asking for a certification of the law on various questions.

Some time prior to the trial here in question, Hillebrand and Powers had been tried under indictments charging Hillebrand with accepting a bribe from one H. M. Dunn, Jr., and charging Powers with being an accessory before the fact to that offense. On that trial the circuit court directed a verdict of acquittal. The Commonwealth appealed for a certification of the law in that case also, and the certification was made in Commonwealth v. Hillebrand, Ky., (1974), 508 S.W. 2d 566. One of the certifications there was that the trial

court had erred in refusing to admit evidence as to Hillebrand's and Powers' dealings with Sutherland. This court was of the opinion that the evidence was admissible as tending to show a pattern of conduct that was relevant to the issue of intent.

On the trial in the instant case, the Commonwealth sought to introduce evidence of Hillebrand's and Powers' dealings with Dunn. The circuit court would not permit the evidence to be introduced, ruling that the evidence should be excluded under the principle of collateral estoppel under the double-jeopardy clause. The correctness of that ruling is the primary question on which the Commonwealth seeks a certification.

At one time the law was well settled that evidence, otherwise competent, of other conduct of a criminal nature was not rendered inadmissible by the fact that the accused had been acquitted of a criminal charge based on that conduct. See 1 Wharton's Criminal Evidence, Thirteenth Edition 624, Sec. 262; Annotation, 86 A.L.R. 2d 1132. But the decision of the Supreme Court of the United States in Ashe v. Swenson, 397 U.S. 436 (1970), on the subject of collateral estoppel as related to double jeopardy, appears in some respects to have qualified the rule.

As we understand the holding in Ashe v. Swenson, it is that if an issue of fact has been determined against the prosecution in the trial of an offense, the prosecution cannot again litigate that issue of fact upon a later trial of the same defendant for another offense. To ascertain whether the issue was in fact determined on the previous trial, the court on the subsequent trial is required to "examine the record of [a] the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." (our emphasis) The specific holding was that the prosecution, on a trial

of a defendant on a charge of participating with others in the robbery of a player in a poker game, was precluded from producing evidence to show that the defendant was one of the robbers, because on a previous trial of the defendant on a charge of robbery of one of the other poker players the defendant had been acquitted. The court said: "The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not."

Applying the principle of Ashe v. Swenson to the instant case, we find that the only issue of fact that must have been decided against the Commonwealth on the previous trial was whether Hillebrand ever physically took possession of the money paid by Dunn to Powers. It is clear from the record that the decision of the trial court to direct a verdict of acquittal was based solely (and of course erroneously) on the fact that the evidence did not establish that the money ever came into Hillebrand's personal possession. Under Ashe v. Swenson, that is the only issue of fact that the Commonwealth was precluded from litigating on the subsequent trial; the Commonwealth was not precluded from introducing relevant evidence as to the dealings of Hillebrand and Powers with Sutherland, excepting only evidence to show that the money was received personally by Hillebrand.

Hillebrand's counsel cites Wingate v. Wainwright, 464 F. 2d 209 (1972) as authority for the proposition that where an accused has been acquitted of a charge of crime, no evidence at all relating to that crime can be admitted on a subsequent trial for another offense. The case does seem to stand for that proposition, but we find the reasoning of the case so faulty as to render the case wholly unacceptable to us as authority. It misinterprets and misapplies Ashe v. Swenson; it evinces a complete misconception of the laws of evidence as to admission of evidence of other conduct of a criminal nature; and it erroneously assumes that motive, a common scheme or plan, guilty knowledge, etc., are elements of a

crime.

In Wingate the opinion says that the prosecution undertook to introduce evidence that the defendant, on trial on a robbery charge, on a previous occasion "had robbed" Joseph Hillman and on another occasion "had robbed" James Angel. It appears that the prosecution was trying to prove only the ultimate fact of prior robberies, as distinguished from showing the conduct of the defendant on those prior occasions. The court in Wingate held that proof of the prior robberies was precluded, under principles of res judicata or collateral estoppel, because the defendant had been acquitted on charges of committing those robberies. The court seemed to be of the opinion that the evidence would have been admissible had it not been for the acquittals. We think that was the court's first error.

As we understand the law, evidence of prior conduct of a criminal nature is admissible, in certain circumstances, to show motive, guilty knowledge, a common plan or scheme, etc. But evidence simply that a person has committed another similar crime (related in those terms without reference to the actions of the defendant) is not admissible, any more than evidence that he has been convicted of another crime (except where allowed for impeachment purposes). Evidence of prior conduct of a criminal nature is not admissible because it shows that another crime was committed, but despite the fact that it may show that another crime was committed. See Henderson v. Commonwealth, Ky., 507 S.W. 2d 454.

Apparently, the initial error of the court in Wingate led it into the second, which was its interpretation and application of Ashe v. Swenson as barring any evidence at all with reference to prior conduct from which a criminal charge arose on which the defendant was acquitted. Ashe v. Swenson plainly says that the only evidence that is precluded is evidence of issues of fact which necessarily were determined against the prosecution on the prior trial.

The third error of the court in Wingate was in its statement that the evidence of the former robberies was offered to prove "some element" of the instant offense. Of course, it was not for that purpose; it was to convince the jury that the defendant had committed the acts, otherwise shown in evidence, that constituted the elements of the offense.

It appears that the circuit court in the case here on appeal was led into the same errors committed by the court in Wingate.

It is our conclusion that the acquittal of Hillebrand and Powers in the Dunn case did not have the effect of precluding the admission of any relevant evidence, in the Sutherland case, as to Hillebrand's and Powers' dealings with Dunn, excepting only evidence that Hillebrand personally received the money.

The Commonwealth asks that we certify the law on certain other questions but we do not consider them of sufficient importance to warrant certification.

The law is certified as hereinbefore stated.

All concur.

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MR. HADDAD: Now, at this time, your Honor, on behalf of the defendant, Mr. Hillebrand, and Mr. Higgins moves on behalf of the defendant Powers, for a directed verdict of acquittal in this case.

The evidence against Hillebrand in this case is not sufficient to sustain a conviction, or to go to the jury. It is merely suspicion. They brought the man in who owned the property and the man said that Mr. Hillebrand was the essence of cooperation; took great pains with him; worked night hours with him; to try to help him to get this property up to standard and to see that he got it up to standard.

Uh - - there is no evidence in this case about Mr. Hillebrand doing anything. He appeared there on the morning of September the 25th. The record clearly indicates, when an attempt was made, that - uh - to give the money to him, he refused to take it. And when a suggestion was made that the money was to be paid to him, he immediately rejected that suggestion and said, "No it's not to me," or words to to that effect, which are already in the record.

Now, when you really analyze this case

they don't have anything, not even a real strong case of suspicion about Hillebrand. And at the very most that they have about Hillebrand is suspicion. But nobody has said that Hillebrand has threatened to take a bribe, or has threatened to do anything unlawful.

Now the testimony from Mr. Vittitow, particularly with reference to these closed files, showed that they have no material benefit once that they're closed, once that the property is brought up to repair. Mr. Dunn said that Powers told him he was going to bring the property up to repair. He said he didn't believe him; he didn't think that it could be done; but, nevertheless, that's what Powers told him.

Now, if Powers told him that and made, in doing that, a bad business deal and it was to cost Powers more than that, then it could have been a matter where Powers lost money on the deal. But if he was going to board some of these houses up and was going to repair the others to bring them up to standard - - several of them were burned and it's admitted that those houses were not included in those to be brought up to standard.

But, again, a most recent case on

circumstantial evidence , that I find in the Kentucky Court of Appeals was one that went up from the Kenton - - from the Wayne Circuit Court. It's Moore vs. The Commonwealth, 488 S.W.2d at 7803, and that was decided in December of 1972. (Reading) "In order for a conviction to be had on circumstantial evidence it must do more than create a suspicion. It should be of such character that reasonable minds would be justified in concluding the person charged was guilty beyond a reasonable doubt. In most instances the sufficiency of circumstantial evidence is for the jury, but where evidence fails to incriminate the accused, or is wholly insufficient to show guilt, the court should entertain the accused's motion for a peremptory instruction."

That's Kentucky's rule on circumstantial evidence as late as December of 1972. Now this particular case they held that the evidence was not sufficient to sustain the conviction of a man who was charged with - uh - uh - (reading) ". . insufficient to support a conviction of the defendant who was identified as having been in a store three or fours weeks prior to the date of the robbery in which pistols were taken, one of which was found on the floor on the passenger's side of another's

automobile nine days later when the officers asked the defendant, who was sitting on the passenger's side, to get out of the vehicle, but he was not placed in the vicinity of the store in question other than on the one occasion."

In other words, in that case this defendant had been seen in that store. Subsequently the store was robbed; subsequently the defendant was a passenger in the automobile; - uh - the automobile was stopped; the officers - uh - - the defendant was sitting on the passenger's side; - uh - he got out, there was a pistol which proved to be one of the stolen pistols. They held that that was not sufficient evidence to sustain a finding of guilt in that case on circumstantial evidence.

And that's a much stronger case than you have here.

MR. HIGGINS: In other words, that there was a suspicion that he was guilty.

MR. HADDAD: Yeah, there was a suspicion that he was guilty, but that wasn't sufficient.

In addition to that you even had a presumption in law against the defendant at that time: (reading) ". . . that possession of stolen property by an accused is prima facie evidence of guilt, but

possession from which guilt may be inferred must be personal and such as is involved in distinct and conscious assertion of possession by the accused. Unless such possession is in this personal character the accused is not obligated to explain the presence of stolen property."

Now, again , in this case the very most that you have is Hillebrand attending the meeting. Dunn said he expressed surprise as to why he was there that morning. Dunn never did say that Hillebrand was going to get any money. Uh - nobody said that Powers even said that Hillebrand was going to get any money. Nowhere through this whole thing does anybody say Hillebrand was going to get any money.

That's the key to this thing. Dunn doesn't say that Powers told him Hillebrand was going to get any money. Terry doesn't say that - uh - Powers told him that Hillebrand would get any money. Nothing was said on September the 25th that would indicate that Hillebrand was going to get any money, just to the contrary. So how could Hillebrand be guilty of accepting a bribe if there is no evidence, no testimony of anybody that he was going to get any money. It's just surmise and suspicion,

however strong, still not sufficient to sustain a finding of guilt. And Hillebrand is clearly, Judge, entitled to a directed verdict in this case.

I know how you feel about this case and I know what your predisposition has been about these particular type of cases, involving public officials. But, nevertheless the law is the law and we've got a situation here where this guy is just clearly not sufficient evidence to let this case go to the jury on Hillebrand.

MR. HIGGINS: Judge, I'll give you - -

BY THE COURT: (Interrupting) Well, maybe Frank wants to respond first.

MR. CORYELL: I'll wait.

BY THE COURT: You want to wait?

MR. CORYELL: Yes.

BY THE COURT: All right.

MR. HIGGINS: Judge, on - - first I agree with everything that Mr. Haddad has said with reference to Mr. Hillebrand, there is absolutely nothing on him. Judge, as I understand this case now, after hearing this proof, the only witness and the only person who is involved in the giving of the bribe, the alleged bribe, is Dunn. Now that's all. He's the man that's supposed to have given

a bribe.

Now Mr. Dunn has stated on several occasions that first he had a number of conversations with Mr. Powers and that they entered into a business deal. And he said that he reduced it to - - made a written - uh - memorandum of the work that Powers was supposed to do and he required Mr. Powers to sign it, which Mr. Powers did. And then they would not give the - - a copy, or let it out until they knew that with this much work done the files would be destroyed on the - uh - on the property.

And he further said that - uh -with a hustling contractor that there was nothing unusual about paying a man in cash, or paying him this much cash, that he had done it on many occasions. He further said that he really didn't know - uh - uh - what Powers was going to do; that he - - the last statement he made out here on his last call to the stand, his statement was "That what I really thought he was going to do was go out there and do the work and then not pay the material men and take off." Now that's his last statement.

So that it shows there was never any intent on the part of Dunn to pay a bribe. Mr.

Dunn, the man who had to make this bribe, had to put up the bribe, has never said that he made a bribe. He has never said he was asked for a bribe. And, as Frank says, of course, Hillebrand never entered into the conversations.

So this case absolutely does not rise above the level of suspicion. At this meeting out here - uh - I recalled especially the testimony that Terry, trying - - trying to build a case, laid the money in front of Hillebrand. Laid the money down in front of Hillebrand. And when he did Mr. Dunn, when he was testifying on direct examination by the Commonwealth, he said that Hillebrand flinched and looked surprised. Hillebrand flinched and looked surprised. And then the money was pushed down to Powers.

Now, if - if there is any evidence that I see - - that I can see - - I just cannot see any evidence in this case where Hillebrand was bribed and took $15,000. There is no question that he didn't take that money. And the one that did take it, the evidence is that he was taking it to repair the property. Now, whether he intended to or not that is what the evidence is. There is no evidence to the contrary.

Now, of course, the purpose of my reiterating some of Mr. Haddad's comments is that without a conviction of Mr. Hillebrand for bribery - uh - Mr. Powers certainly cannot be convicted of an accessory before the fact. And for that purpose I join in the motion for a finding of not guilty as to Powers. And I'm as serious as I can be about it. There is just no evidence but suspicion. That's all.

BY THE COURT: Okay.

You two have finished. Mr. Coryell.

MR. CORYELL: Judge, in response I would say that it is clear that Mr. Hillebrand agreed on an illegal action, to-wit, destruction of public property, City Building and Housing files. The testimony is clear to this fact. "They will be destroyed. I want to be a witness when they're destroyed."

The evidence is clear that the consideration for his agreeing to the destruction was the passing of the $15,000. Whether the money was actually handed to Mr. Hillebrand, or to the bag man, Mr. Powers, I think is immaterial. The two of them were acting in concert. And they were leaving together with the money at the time of their

arrest.

I think that the evidence clearly shows that there is a bribe and that Mr. Hillebrand acquiesced in the bribe; that he was doing everything in his power to see that the bribe was carried out. I think we have more than made a prima facie case, and for that reason I think the defendants' motion should be overruled.

MR. HADDAD: If he had any evidence at all that Hillebrand was to get any of the money you might have something there. But there is no evidence here that Hillebrand was to get any of the money. Now he is surmising as far as Doug Powers is concerned going to give Hillebrand anything. Nobody, including Powers or Dunn, has ever said that anybody ever said Hillebrand was going to get any money.

And how can Hillebrand be guilty of accepting a bribe if nobody ever says that he was going to get any of the money. And I think the proof is definitely that he didn't get any of the money.

BY THE COURT: Nobody got any money.

MR. HADDAD: Powers got the money.

BY THE COURT: Yes, but - - when you say get it, I'm talking about getting set

with it.

MR. HADDAD: Well, I'll agree with that, but I'm talking about in the legal sense of the word. Hillebrand, legally, factually and all otherwise, Hillebrand did not receive any of the money. Nor is there any testimony that he was going to receive any of the money.

Now, if they would have said that Doug Powers told us that he would give Hillebrand "X" number of dollars and for that amount of money Hillebrand would destroy the files and he would do this and he would do that, you might have a different story, but you don't have that proof in this case. You don't have that testimony, even by their witnesses.

So I just don't think, Judge, there's any proof at all against Hillebrand. Now on a stretch of, you know, whatever - uh - uh - other offense that may have been committed by Powers in the acceptance of that money, it certainly can't be of aiding and abetting the commission of accepting a bribe, because they haven't shown where it was a bribe. Whether he obtained it by false pretenses, that's another case. But certainly not in this instance, accepting a bribe or aiding and

abetting in accepting a bribe.

So, if the jury convicted these men it would have to be merely on suspicion, merely on suspicion that they intended to do the wrong thing, and not based on any evidence that's in this case.

BY THE COURT: All right, let's go off the record, Ms. Margueryte.

(Whereupon there was off record discussion.)

BY THE COURT: After considering the matter and arguments made by the defense and the Commonwealth, the Court is going to direct a verdict in this matter, a verdict of acquittal, because unless you convict Hillebrand you are not going to be able to convict Powers. He's charged as - - aswhat, an accessory?

MR. HADDAD: Aider and abettor.

BY THE COURT: Aider and abettor, and the evidence is just not such that it should even be given to a jury for deliberation against Hillebrand.

MR. SCHROERING: Of course we completely disagree.

BY THE COURT: Well, Okay.

MR. SCHROERING: With the Court's statement of facts in this case, we feel that it is eminently clear that the defendant Hillebrand agreed for the consideration of $15,000 to destroy public records; that the whole deal was set up by Powers; and that the occasion under question was the - - when the - uh - when the actual money passed hands was taped; the money was recorded. And there is ample evidence short of motion pictures to prove every essential element of the crimes charged against these two defendants. And the Commonwealth feels that the action of the Court - - of the Court in directing a verdict in this case is a travesty.

BY THE COURT: All right.

Anything else?

All right, off the record.

(Whereupon there was further off record discussion and in chambers hearing concluded.)

- - - -

Whereupon, court having been called to order after in chambers hearing and the jury seated in the jury box, the following proceedings were had:

MR. CORYELL: For our next witness, the Commonwealth intends to call H. M. "Skip" Dunn, Jr., who was involved in a similar type transaction with Mr. Powers and Mr. Hillebrand covering approximately the same period of time and I guess you want to know what I'm going to ask him and basically I'm going to ask Skip "Would you tell us the pattern that was used in Mr. Powers' and Mr. Hillebrand's contacts with you. What did they do?"

MR. HIGGINS: We just want the type of questions first, don't we?

THE COURT: The Court would be interested in knowing what evidence is going to be tendered here. Some of it may be competent and some may be incompetent, but the Court would like to rule on it before it is presented to the jury. I guess we should have, Mr. Dunn, suppose you move your chair around here so that the Reporter and both attorneys can hear you. I think, Mr. Coryell, at this time you might ask Mr. Dunn what you intend to bring out or desire to bring out, and if there are any of their objections sustained, it can go in the record by way of avowal at this time.

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MR. CORYELL: Do you want me to allow Mr. Dunn to answer the questions himself?

THE COURT: Yes.

MR. CORYELL: He isn't sworn or under oath yet, Judge. Do you want to have him sworn before we do this?

THE COURT: I suppose we might as well.

(REPORTER'S NOTE: The witness was then sworn by the Clerk.)

H. M. DUNN, JR., having been first duly sworn was examined and testified as follows:

Examination

by Mr. Coryell:

1. For the record, state your name.

A H. M. "Skip" Dunn, Jr.

2. And, Skip, where are you presently residing?

A At the Kentucky State Reformatory at LaGrange.

3. And could you tell me why you're there?

A Yes, for violating Kentucky Revised Statute 289.231.

4. And did you have occasion during

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the fall of 1971 to have any business dealings with Bob Hillebrand and Doug Powers?

A Yes.

5. And would you tell us briefly how these dealings arose?

A Yes. As the President of American Building and Loan Association or American Building and Loan Association of which I was the President, had a number of mortgages on some property in the South End of Louisville that had come under some newspaper publicity or whatever, but Doug Powers contacted me and advised me of the problems with the property. Now at the first contact or two that I had with Doug, I was not aware of the properties, knew nothing about them and then I did make myself aware of them and made myself aware of the owner of the property and who it was and the status of the loans and everything and Doug Powers told me that these properties were extremely deteriorated and that there had been some conersation in the Building Department office or with the Building Department Personnel about suits being filed to condemn them if they weren't repaired and Doug, all of this took place over, now I'm bringing it down to one conversation, but

it took place over two or three phone calls or two or three meetings, and the sum total of the whole thing was that for fifteen thousand ($15,000) dollars the problem could be eliminated.

6. And this was with Mr. Powers, is that correct?

A Yes.

7. And then what happened?

A Well, of course it was eventually agreed that a meeting would be arranged according to Mr. Powers with Mr. Hillebrand, Mr. Powers, myself and my attorney.

8. Now, you testified there were several conversations. When was the earliest conversation you can recall?

A I believe it was in the summer of 1971, June, July, or someplace in there. I'm not familiar with the dates. I have forgotten a lot of things.

9. Okay. Now, did you in fact pay the money to Mr. Powers?

A No, I don't believe that I did. I believe that Mr. Terry gave the money to Mr. Powers.

10. Was this done in your presence?

A Yes.

MR. HADDAD: I think we're getting now to that meeting on Saturday morning and all the arrests were made. That's what he's talking about there.

MR. CORYELL: Judge, I think still this goes to showing the pattern. It is the modus operandi that these men use, and I think the fact that the similarity between this and what Mr. Sutherland will testify to when he is called makes this testimony admissible.

THE COURT: Let's see what else this witness has to say, and I'll rule on its competency.

MR. CORYELL: Yes sir.

11. Did you in fact later meet with Mr. Hillebrand and Mr. Powers together?

A Yes.

12. And at that time did you have any specific conversation with Mr. Powers concerning in what capacity he was operating in these dealings with you?

A Well, you mean what I said to Powers and what Powers said to me?

13. Did you have a conversation concerning that?

A Yes, we had a conversation, yes, sir. I mean I don't remember exactly what I said to Powers. I think I made two or three unkind remarks and referred to him as the "bag man" that Saturday morning. I think I remember that, and I think he told me he didn't give a damn whether he was called a bag man or what as long as he could make enough money and get to Florida or something like that.

14. Okay. And during this conversation you had with Mr. Powers, was this in the presence of Mr. Hillebrand?

A Yes.

15 Okay. And during this time, did he . . .

MR. HADDAD: Excuse me. Are you still talking about the conversation that took place that Saturday morning?

MR. CORYELL: That's right.

16. During this time, did he, did Mr. Powers also make statements to you concerning his ability or inability to get things done within the County Government, City and County Government?

A Yes, he said or inferred, but he did say that he was a, of course he had said

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this on two or three other occasions, he said he was a committeeman of the Democratic Party, and if I had any problems he could cure those because of his position and I think during that conversation I believe it was that Saturday morning or it might have been an earlier one that Mr. Hillebrand was being groomed for the position of Mayor of the City of Louisville and possibly Governor or Lt. Governor later on or something like that, and that he was the mechanic so to speak.

17. And during the course of these conversations that you had over a period of time with Mr. Powers, he indicated that for this fifteen thousand ($15,000) dollars you testified to he could do what?

A That he could get all the problems cured with the Building Inspector's office as it related to the houses within the South End and one of the ways that it was going to be cured was that the files would be destroyed.

18. And this was confirmed by Mr. Hillebrand, is that correct?

A Yes.

19. And what files, you referred to some files. What files were you talking about being

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destroyed?

A I was talking about the files that the various building inspectors or compliance inspectors or whatever you call them had made up on the houses in question within the South End that American had the mortgages on. There was some twenty-one houses and they were duplexes so there were forty-two units, forty-two separate addresses. As best I can remember that was the information and there was a file on each one of these addresses.

20. All right. Now, Mr. Hillebrand was arrested on September 25, is that correct?

A If you say it. I don't know the date.

21. I'm going to ask you what you have told us so far, how much of this occurred prior to September 23 which would have been two days prior to the day the money was passed there at Aire Internationale?

A I would say ninty-five percent occurred prior to that with Mr. Powers and five percent maybe occurred the morning of that day or the morning he was arrested that Saturday morning.

22. Prior to the 23rd, had everything

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been done except the actual passing of the money?

A Yes, everything had been agreed on or all the necessary conversations was out of the way.

MR. HADDAD: Powers or Hillebrand?

THE WITNESS: No, Powers. At this time I had never talked to Mr. Hillebrand. A meeting was set up with Powers to meet in Mr. Powers office at the Greyhound where he has an office out on I-64 and then it was later changed to an office out at Bowman Field.

23. Now, prior to September 23, had you received anything that would indicate that Hillebrand knew what was, that this was going on? Had anything happened then?

A I had been shown and handed some Building Inspectors' files from the Building Department of the City of Louisville.

24. This was prior to the 23rd of September?

A Oh, yes, this was some time before that.

MR. CORYELL: Judge, without going into something that would take maybe several hours for the Court to hear, because the Court has already

heard it, the Commonwealth moves at this time that this witness be allowed not only to testify before the Jury to what he had already testified to, but also to the occurrences that occurred that morning at Aire Internationale at which time the money was passed. We have the original tape upstairs of that conversation. You have had an opportunity to listen to the tape. We feel that first of all this occurrence is admissible on the grounds that it is merely a final accumulation bringing to an end the transactions and negotiations that had been going on since according to Mr. Dunn's testimony sometime in the summer, June, July, and carrying over a period of approximately two to three months, said two or three months being simultaneous to the negotiations that were going on in the instant case. We feel that under the ruling of the Court of Appeals of Kentucky in the case of Commonwealth versus Hillebrand, it was ruled that where two individuals over a period of time simultaneously carry on a pattern of conduct even though it is two separate offenses, the evidence of these two offenses can be presented to show a pattern of conduct relevant to the issue of motive and intent. We feel that, and thi is the direct case that is in question, just as the

acts involving Mr. Sutherland were relevant to show motive and intent and a pattern of conduct thereto in dealing with Mr. Sutherland and we feel the fact that the final accumulation of this, the paying of the money, the other five percent of the deal that occurred two days after is close enough to be considered simultaneously with and is relevant to the issue at hand.

In addition, we feel that Mr. Powers statements concerning what he is doing are very material to his intentions and we feel this is what the Court of Appeals had in mind when they handed down their ruling in the Commonwealth versus Hillebrand and we feel it would be error to exclude this testimony.

THE COURT: The record might show that the transcript of the conversation that took place between this witness and Mr. Hillebrand and Mr. Powers on September 25, may be made a part of the record. The Court has previously listened to the tape recording of that conversation and as I understand you are filing the original of that tape with the record, is that right, Mr. Coryell?

MR. CORYELL: The Clerk has it in his possession and we will ask the Clerk to make this

an Exhibit. This is part of the exhibits sent back by the Court of Appeals.

THE COURT: I think it can be made a part of the record without this witness relating all that took place.

Gentlemen, this witness' testimony to the effect that Mr. Powers had made a statement to him that he was a Commiteeman with the Democratic Party and could get things accomplished would be admissible in the evidence. However, the Court is of the opinion that the remainder of the testimony of this man relates to an offense of which the defendants have been in jeopardy and have been acquitted under the direction of the Trial Court. They cannot be put in jeopardy twice for the same offense. That is one of the safeguards of our American system of Government. Now other acts to show motive and intent have been admitted under our theory of the law. Generally I think those acts have to antidate the offense for which the defendant is bei tried at the present time, but we are confronted in this case with this item of evidence with the Constitutional safeguard of being twice placed in jeopardy. It is the opinion of this Court from listening to this tape and from the Court's

knowledge of this case that if the evidence of this witness and the tape recording of the meeting on September 25, 1971, were admitted into evidence, there would be a serious wrong done to the defendants by a calculated injection of an offense for which they have already been acquitted and for that reason the Court is going to sustain the objection and not permit the Commonwealth to introduce the evidence that this witness has just given in chambers except the testimony of Mr. Powers that he was a Commiteeman and influential in the Democratic Party and can get things done. I think that might be competent.

MR. SCHROERING: On behalf of the Commonwealth, as I understand the Judge's ruling because of the acquittal or directed verdict by the Court in a previous case entitled Commonwealth versus Hillebrand in which the defendants were acquitted of accepting a fifteen thousand ($15,000) dollar bribe, that the occurrence which occurred on September 25, 1971, and that would be specifically the meeting that took place at the Aire Internationale with them out here at Bowman Field which actually saw the transfer of the fifteen thousand ($15,000) dollars and the tape recording of the conversation attendant thereto together with the money, that

would not be admissible in evidence on those grounds that the Court has indicated, is that correct?

THE COURT: That is correct.

MR. SCHROERING: However, I believe the Court inferred that acts of the defendants which antidated that, for example, things that occurred in June and July and August, concerning conversations with Powers and this witness, those statements, the promises and other statements that were made of the proof of the receipt of the money, because the crime of course that they were charged with to which jeopardy attaches is not an offer to accept but actually the receipt of the money in question that I take it from the Court that those conversations plus of course the conversations relative to Powers "being able to get things done" because of his job that those areas of investigation would be admissible if they occurred prior to the 23rd of September of 1971, is that correct?

THE COURT: Yes, I would say so. I think general statements to that effect without specific reference to the other case, his connection with the Democratic Party and his ability to get things done.

MR. HADDAD: Well, I think he is trying

to get you to say, Judge, that you are going to allow Dunn to give testimony about the things that led up to that meeting on September 25.

MR. HIGGINS: About the other case.

MR. HADDAD: About the other case. That's what he is saying.

THE COURT: It is obvious that some statements made if there were such statements could be admissible in either case or both cases. I think if they are statements made in a general way that they do not identify them with this case for which he had been acquitted, that might be competent in this case.

MR. HADDAD: Well, I think that's what you said that you would permit them to bring in general things that he was with the Democratic Party but to get in the details that he was going to see that these houses were not condemned . . .

MR. HIGGINS: No question about it.

THE COURT: That could not relate in any way to granting this license to Sutherland charged in this case. I know the Court of Appeals has ruled that evidence of another crime may be introduced to show motive and attempt and mode of conduct and so forth, but you are confronted with the double

jeopardy clause here of the Constitution and that is the primary reason I am ruling out this other area, facts that led up to the other case.

MR. CORYELL: Are you ruling then that statements made generally whether it precedes or anticedes the 23rd of September, may be used which specific statements may not be?

THE COURT: They would have to precede it.

MR. SCHROERING: And there would be evidence, of course, Judge, of the fact that Mr. Powers represented himself as being an employee of the Housing Department.

THE COURT: I think that's competent.

MR. SCHROERING: When we get to the specifics of the fifteen thousand ($15,000) dollars, that's not?

THE COURT: That's right.

(REPORTER'S NOTE: Whereupon the Court, Counsel for the Commonwealth and the Defendants, the Court Reporter and the witness returned to the Courtroom where the following proceedings then were held.)

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